

**TCEQ Docket No. 2019-0624-AIR  
TCEQ Air Quality Permit Number 139561**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>TEXAS LNG BROWNSVILLE, LLC</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>FACILITY IN CAMERON COUNTY, TEXAS</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**Vecinos Para el Bienestar de la Comunidad Costera and  
Shrimpers and Fishermen of the RGV Reply to  
Responses to their Hearing Requests**

Please consider this reply by Vecinos Para el Bienestar de la Comunidad Costera (VBCC) and Shrimpers and Fishermen of the RGV (Shrimpers) collectively, Protestants to responses of the Executive Director and OPIC to requests for a contested case hearing on Texas LNG's air permit application.

**Protestants and affected party status.**

There is no dispute that Protestants' comments and requests for a contested case hearing were timely filed. According to the ED's Response, Protestants do not meet the requirements for associational standing solely because their individual requestors' homes do not meet an undefined distance standard.

Exposure to risk beyond that to which the general public is exposed is the trigger for a particular person's standing to participate in civil proceedings, including regulatory proceedings.

The issue is whether Foster [the would-be party] is genuinely at risk of being affected by the proposed campus. The risk that the campus will adversely affect her neighborhood is sufficient to confer standing on Foster. She does not have to prove the extent of future harm to proceed.

*Save Our Springs All., Inc. v. Lowry*, 934 S.W.2d 161, 163 (Tex. App. 1996).

*Pennell v. City of San Jose*, 485 U.S. 1, 8, 108 S. Ct. 849, 855, 99 L. Ed. 2d 1 (1988) (landlord in the category of persons at risk of ordinance enforcement has standing) is to the same effect.

TCEQ rules contain no distance restrictions for defining whether a person is an affected party with protected interest in this matter. See 30 Tex. Admin Code § 55.203(c)(2). By arbitrarily applying a distance standard, the ED argues for a drastic change in the Commission's referral process.

Because the area of impact for air emissions depends on multiple factors—including the type and level of emissions, the height of the emission source, and the area topography and meteorology—the law does not include a distance limitation for affected persons. Indeed, persons have been granted affected person status who live many miles from the source. For example:

- **In Re: Application of Air Quality Permit No. 102892 for the Construction of a New Ethylene Production Unit at ExxonMobil's Baytown Olefins Plant:** an individual qualified as an affected person in a challenge to ExxonMobil's Baytown Ethylene plant permit based in part on her ownership of a motorcycle repair shop, which was located 4–5 miles from the Exxon plant. Her home was about three blocks from the shop (SOAH Docket No. 582-13-4611; TCEQ Docket No. 2013-0657-AIR).
- ***In Re: Application for Air Quality Permit No. 85013; PSD-TX-I138, and HAP 48 for the Las Brisas Energy Center, LLC:*** in the 2009 challenge to construction of the Las Brisas power plant, individuals were admitted as affected persons who lived more than 10 miles from the plant site and more than a dozen individuals were admitted as affected persons who lived more than 5 miles from the site. For example, Mr. Whakefield was an active participant in that hearing and his home was approximately 9 miles from the Las Brisas site. (SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR).
- **In Re: Application for Air Quality Permit Nos. 79188, PSD-TX-1072, and HAP 14 for NRG Texas Power LLC:** affected party status was granted to Douglas Ray, who lived

approximately 4 miles from the site. (SOAH Docket Nos. 582-08-0861 and 582-08-4013; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR).

In September 2015, the TCEQ adopted new procedures for public participation in environmental permitting pursuant to the requirements of S.B. 709 (GI-233). The new requirements clarified the process and information that the public needed to submit in order to timely and adequately request a contested case hearing. However, neither S.B. 709 nor the updated TCEQ guidance changed the definition of who qualifies as an “affected person,” in order to be granted party status in a contested case. See 30 Tex. Admin. Code § 55.203(a). Given the opportunity, the Legislature declined to redefine “affected person,” and declined to set an arbitrary distance limit for this type of air permit. Similarly, the TCEQ also declined to set a distance limit when it issued new rules and guidance after September 2015. Therefore, previous court rulings, TCEQ determinations and SOAH decisions on the definition of an “affected person” must be followed in this matter. The applicant’s arguments regarding a distance limit of one mile must be rejected. Also, the ED’s vague assertions of a distance limit are also unsupported by any law or prior decision.

#### **VBCC.**

OPIC recommends that VBCC be found an affected person. VBCC is an affected person because the community, Laguna Heights, is within 4 miles of the proposed facility and VBCC members also recreate and work along the Ship Channel.

The ED, does not adequately assess whether the interests claimed by VBCC are common to the general public. Members of VBCC live closer to the facility than do members of the general public, and some group members travel past it to access basic services like grocery stores

and healthcare providers. The fact that many people in the area have similar driving routes does not negate the injury to Protestants and Ms. Avila in particular.<sup>1</sup>

Ms. Avila works as a kitchen preparer at a seafood restaurant on South Padre Island. Because of the location of her home and because Ms. Avila's work and personal needs require her to routinely come close to the proposed facility, she is more affected than a member of the general public. Ms. Avila is concerned about the impacts of increased air pollutants and risk of accidents and explosions from the proposed facility on her health and safety.

#### **Shrimpers.**

OPIC also recommends that Shrimpers be found an affected person. Ms. Burnell works approximately 40 hours per week at the Shrimp Outlet near the proposed facility site. Crew members for Shrimp Outlet must pass by the proposed facility site to carry out their job responsibilities. Ms. Burnell, who relies on shrimp sales for her livelihood, is concerned that air pollution from the facility will have a negative impact on the local environment and impact both the quality of her product and customers' interest in purchasing local shrimp. Ms. Burnell's ability to continue making a living is "a personal justiciable interest related to a[n] . . . economic interest affected by the application," as required for affected person status by 30 Tex. Admin. Code § 55.203(a), and is not common to members of the general public. There is a reasonable relationship between Ms. Burnell's air quality, health effects, and economic concerns and the regulation of air contaminants.

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<sup>1</sup> "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody . . . where a harm is concrete, though widely shared, the Court has found injury in fact." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7-8 (Tex. 2010), quoting approvingly *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-688 (1973) and *FEC v. Akins*, 524 U.S. 11, 24 (1998).

Ms. Burnell is impacted more than the general public because of Shrimp Outlet's proximity to the site. Parties have been admitted to contested case hearings on TCEQ air permits for operating businesses close to the proposed facility site. As mentioned above, in 2013 an individual qualified as an affected person in a challenge to ExxonMobil's Baytown Ethylene plant permit based in part on her ownership of a motorcycle repair shop, which was located 4–5 miles from the Exxon plant. *In Re: Application of Air Quality Permit No. 102892 for the Construction of a New Ethylene Production Unit at ExxonMobil's Baytown Olefins Plant* (SOAH Docket N0. 582-13-4611; TCEQ Docket No. 2013-0657-AIR).

Ms. Burnell also must pass the facility site multiple times a week to carry out her work responsibility of transporting shrimp from a processing center to the store. It is not feasible for her to travel an alternate route because State Highway 48 is the most direct route and the next best route would take much longer and use more fuel. Ms. Burnell also passes the facility when she visits her mother on South Padre Island. Ms. Burnell is concerned that air pollution from the facility will have negative impacts on her health.

The ED rejects the standing credentials of the Shrimpers and Fishermen of the RGV on the sole rationale that Ms. Burnell resides too far from the site. The ED neglects to consider that she works and docks boats at the Shrimp Outlet. The Shrimpers and Fishermen hearing request alleges that the crews on the Shrimp Outlet boats pass along the ship channel past the proposed LNG facility, and the record shows the proposed LNG facility abuts the ship channel. The hearing request makes the credible allegation that Ms. Burnell is concerned about the facility's emissions' impacts on her health and on that of her boats' crews. By logical extension, adverse impacts to the health of her crews will adversely impact Ms. Burnell's business and those of other shrimpers docking up-channel from the proposed facility site.

The ED's focus on the distance to her residence is misplaced. The agency's regulation that guides the "standing" decision, 30 TAC § 55.203, makes no reference to the location of a would-be "affected person's" residence as an appropriate factor to consider. Travel to and in the vicinity of a project, if the travel is an actual historical fact and not merely an option in the future, is widely accepted to bestow a justiciable interest on the traveler. Thus, in *S. Utah Wilderness All. v. U.S. Dep't of Interior*, No. 2:13-CV-01060-EJF, 2015 WL 4389580 (D. Utah July 17, 2015), the court reasoned, at \*8, that a would-be party sufficiently alleges a geographical nexus to a challenged project, when, in that case, "he" states (1) he has gone multiple times to a spot within 26 miles of the project site, (2) he has rafted on a river within half a mile of the project site, (3) he has traveled extensively through the project area, and (4) he has traversed through or within view of the parcels of land where the project is planned to occur. In *N. Arapaho Tribe v. Ashe*, 925 F. Supp. 2d 1206 (D. Wyo. 2012), at 1214, the court found that requiring native American tribal members to travel greater distances and to bear additional expenses for travel and other logistics were particularized burdens that contributed to establishing the members' standing.

Ms. Burnell's and that of her boats' crews travel proximity to the site are not conjectural or hypothetical. Unlike other residents of the State or, even, of the county, she and they have and will surely in the future pass along the Brownsville Ship Channel in close proximity to the project site. And, travel to or near a project site has long been recognized as establishing a geographical tie to a project that vests in the traveler standing.

The ED's sole reason for not finding Ms. Burnell an affected person is that her residence is several miles from the proposed facility site. Ms. Burnell's employment and family commitments, however, frequently place her closer to the facility than the general public.

Additionally, Ms. Burnell has a personal justiciable economic interest in local air quality. Therefore, Ms. Burnell is an affected person and Shrimpers have associational standing.

In addition to Ms. Burnell, there are other members of Shrimpers who have concerns about the proposed facility's impact on them. Shrimpers member Jaime Garcia is a commercial fisherman and fishes in the Brownsville Ship Channel almost every night when weather permits. Mr. Garcia lives at 33 Bueno Drive, Brownsville, TX 78520. His phone number is 956-521-1944. Mr. Garcia passes the facility site almost every time he fishes in the Ship Channel. Mr. Garcia also travels from Brownsville to Port Isabel almost every day to fish. He travels along State Highway 48 and passes the facility site on his way to Port Isabel. If he took the State Highway 100 route, Mr. Garcia would have to spend more time and gas money and would also experience more wear and tear on his vehicle.

Shrimpers member Amber Thomas lives at 4306 Shafer Road, Bayview, TX 78566, within 10 to 11 miles of the proposed facility site. Her phone number is 956-909-0898. She has concerns about the air quality impacts of the LNG facility because of their potential health effects on me and my family. Ms. Thomas works at Burnell Marine Supply, 2230 Fisherman's Place Road. It is in the same building as Shrimp Outlet, within 5 miles of the proposed facility site. Ms. Thomas's work hours at Burnell Marine Supply are 9 a.m. to 5 p.m. She commutes past the facility site on State Highway 48 to go to work and back every workday. Ms. Thomas also travels on State Highway 48 past the facility site to buy groceries and visit the bank in Brownsville.

**Conclusion.**

Protestants maintain that they are affected persons for purposes of the air permit application. The issues recommended by the ED and OPIC should be referred to hearing, along with the other issues raised by Protestants.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on June 3, 2019 the foregoing document was filed with the TCEQ Chief Clerk and copies were served to all parties on the attached mailing list by deposit in the U.S. Mail.

  
Enrique Valdivia



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